89-1344

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., AS
MANAGING GENERAL PARTNER OF
EP OPERATING COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Under the Natural Gas Policy Act of 1978 ("NGPA"), "first sales" of natural gas may either be subject to specified price ceilings or are deregulated, depending upon an NGPA category "determination" made by the Federal Energy Regulatory Commission under Section 503 of the NGPA. The question presented is:

Whether the Courts of Appeals have jurisdiction under Section 506(a)(4) of the NGPA, the general judicial review provision, to review orders of the Federal Energy Regulatory Commission "reopening" final determinations that gas produced from identified wells is "high cost" natural gas.

RULE 14.1(b) LISTING OF PARTIES

Petitioner

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company

Respondent

Federal Energy Regulatory Commission

Intervenors

Delhi Gas Pipeline Company
Southern California Gas Company
Texas Eastern Transmission Corporation
The Travis Peak Producers Group:
Texas Crude, Inc.
Wessely Energy Company
Herd Producing Company, Inc.

RULE 29.1 LISTING

Enserch Exploration, Inc. is the Managing General Partner of EP Operating Company. Enserch Corporation, a Texas Corporation, is the parent of Enserch Exploration Inc. A listing under Rule 29.1 naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Enserch Corporation and Enserch Exploration, Inc. is as follows:

Name of Company	*State or County of Incorporation*
ENSERCH Corporation	Texas
Enserch International Investments Limited	Delaware
Canatom Heavy Water Limited	United Kingdom
Humphreys & Glasgow Consultants Private Limited	India
INITEC-Humphreys & Glasgow Procesos S.A.	Spain
Humphreys & Glasgow Inc.	Delaware
Earl and Wright	California
H&R-E&W Pty. Ltd.	Western Australia
British Offshore Engineering Technology Limited	United Kingdom

Enserch Holdings (U.K.) Limited	United Kingdom
Losinger AG	Switzerland
Losinger USA, Inc.	Delaware
Losinger Immobilien AG	Switzerland
Losinger Chile y Campania Limitada	Chile
Losinger Ltd.	Kenya
Losinger Sdn. Bhd.	Malaysia
Losinger	Chile
Valencuela Ltda.	Chile
Fietz & Leuthold AG	Switzerland
J. Bariatti S.A.	Switzerland
Losinger Bau AG	Switzerland
Losinger Bauunternehmung AG, Luzern	Switzerland
Baufinag S.A.	Switzerland
Repave AG	Switzerland
Losinger Delemont S.A.	Switzerland
Losinger Fribourg S.A.	Switzerland
Sables et Graviers Tuffiere	Switzerland
Losinger S.A. Crissier	Switzerland
Losinger S.A., Sion	Switzerland
Losinger Ticino S.A.	Switzerland
Lumesa S.A.	Switzerland
Moos AG	Switzerland
Prader AG	Switzerland
Prader Tunnelbau GmbH	West Germany
Prader & Co. AG	Switzerland
Hediger Hoch-und Tiefbau AG	Switzerland
Losag AG	Switzerland
BAB Bau AG, Brienz	Switzerland
Binladin-Losinger Ltd.	Saudi Arabia
VSL International Ltd.	Switzerland
Presyn AG	Switzerland
VSL Corporation	California
International Construction Systems, Ltd.	Canada
VSL Prestressing Pty. Ltd.	Australia
VSL Stressbar Pty. Ltd.	Australia
VSL Engineering Pty. Ltd.	Australia
VSL Systems Pte. Ltd.	Singapore
Suspa GmbH Laugenfeld	Germany
VSL Far East	Singapore
Rudloff-VSL Protendidos Ltda Singapore	Brazil
VSL France S.a.r.l.	France
Produits Brosset S.a.r.l.	France
VSL Italia S.p.a.	Italy

Preco s.r.l.	Italy
VSL Indonesia	Indonesia
VSL Korea	
VSL Engineers (M) Sdn. Bhd.	Malaysia
VSL Engineers Hong Kong Ltd.	Hong Kong
VSL Thailand	Thailand
VSL Systems (B) Sdn. Bhd.	Brunei
VSL Japan	Japan
Dorsch Consult AG	West Germany
Pool Company	Texas
Pool Americas, Inc.	Texas
Seamaster Offshore Inc.	Canada
Pool International, Inc.	Texas
Pool Arabia, Ltd.	Saudi Arabia
Intairdril Oman L.L.C.	Oman
Pool Santana, Limited	Trinidad/Tobago
Intairdril Ltd.	Cayman Islands
Antah Drilling Sdn. Bhd.	Malaysia
Pool Pakistan Drilling Ltd.	Cayman Islands
Intairdril (U.K.) Limited	United Kingdom
Pool-Wood Production Services (U.K.) Limited	United Kingdom
The International Air Drilling Company	Texas
Intairdril Libya Limited	Libya
Triveni Pool Intairdril Limited	India
Oiltools International Ltd.	Cayman Islands
Antah Oiltools Sdn. Bhd.	Malaysia
Antah Oiltools (S) Pte.Ltd.	Singapore
Antah Oiltools Services Sdn. Bhd.	Malaysia
Fischer-Oiltools (Philippines), Inc.	Philippines
Oiltools (Thailand) Limited	Thailand
Ebasco Services Incorporated	New York
Ebasco Industries Inc. (Delaware)	Delaware
Ebasco-CTCI Corporation	Taiwan
Ebasco Dorsch Consultants Inc.	Delaware
Ebasco Arabia Limited	Saudi Arabia
Ebasco Energy AG	Switzerland
Ebasco Espana, S.A.	Spain
EP Operating Company	Texas
Enserch Exploration Partners, Ltd.	Texas
Enserch Processing Partners, Ltd.	Texas
Encogen One Partners, Ltd.	Texas
Encogen Four Partners, L.P.	Delaware
Freehold Cogeneration Associates, L.P.	Delaware

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FEDERAL ENERGY REGULATORY COMMISSION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company ("EPO"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on October 30, 1989.

OPINIONS BELOW

The opinion of the Fifth Circuit (App. 1a-14a) is reported at 887 F.2d 81. The order denying EPO's timely petition for rehearing (App. 93a) is not reported. The orders of the Federal Energy Regulatory Commission ("Commission") under Section 503(d) of the Natural Gas Policy Act of 1978, 92 Stat. 3397, 15 U.S.C. § 3413 (d), that reopened the well category determinations in question are reported at 41 F.E.R.C. (CCH) ¶ 61,242

(1987) (App. 51a-58a), and 42 F.E.R.C. (CCH) ¶ 61,075 (1988) (App. 81a-87a).

JURISDICTION

The opinion of the Fifth Circuit was issued on October 30, 1989. The court denied EPO's petition for rehearing on November 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 506(a)(4) of the Natural Gas Policy Act of 1978, 92 Stat. 3404, 15 U.S.C. § 3416(a)(4).

STATUTORY PROVISIONS INVOLVED

1. Section 503 of Title 15 of the United States Code, 15 U.S.C. § 3413, which sets forth the procedures by which natural gas is determined to qualify for one or more of the various incentive price categories established under the Natural Gas Policy Act of 1978, 92 Stat. 3352, *et seq.*, 15 U.S.C. §§ 3301-3432, is reproduced at App. 94a-99a.

2. Section 506 of Title 15 of the United States Code, 15 U.S.C. § 3416, which sets forth the procedures, authority and standards for judicial review of Commission action under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432, is reproduced at App. 99a-102a.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals below dismissed, for lack of jurisdiction, EPO's petition for review of Commission orders issued in 1987 and 1988. Those orders "reopened" seventy-three final determinations that natural gas produced from wells completed in the Travis Peak Formation, a geologic formation containing natural gas that lies beneath forty-seven counties in East Texas, qualified for an incentive price as "tight formation" wells.

I. BACKGROUND

The Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 ("NGPA"), "comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of the State Of New York* v. *Mid-Louisiana Gas Company*, 463 U.S. 319, 322 (1983). Title I of the NGPA defines discrete categories of natural gas production, and specifies the applicable maximum lawful prices for "first sales" for each category. *See* 15 U.S.C. §§ 3312-3319.[1]

Section 503(b) of the NGPA, 15 U.S.C. § 3413(b), establishes the procedure by which natural gas becomes eligible for certain of the pricing categories established in the NGPA. A state or federal agency having regulatory jurisdiction over the production of gas (the "jurisdictional agency"), on the application of a producer, determines if a particular well or gas is eligible for incentive pricing under NGPA Section 102, 15 U.S.C. § 3312 (new natural gas and certain Outer Continental Shelf gas); Section 103, 15 U.S.C. § 3313 (new onshore production wells); Section 107, 15 U.S.C. § 3317 (high-cost natural gas); and Section 108, 15 U.S.C. § 3318 (stripper well gas).

The Commission reviews these determinations. The Commission *must reverse* the jurisdictional agency's determination if it finds that the determination is not supported by substantial evidence; the Commission *may re-*

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[1] Prior to enactment of the NGPA, the Commission (and its predecessor, the Federal Power Commission) regulated the prices charged by producers of gas in the interstate market under the Natural Gas Act, 15 U.S.C. §§ 717-717w. Interstate producer rate regulation was effectuated through national ceiling price orders that established different price levels depending on the date the producing well was commenced. The NGPA, by contrast, "generally adopted an incentive-based approach to rate-setting for gas production, providing substantially higher prices for 'new' gas than was currently available." Ecee, Inc. v. FERC, 645 F.2d 339, 345 (5th Cir. 1981).

mand a determination to the jurisdictional agency if the determination is inconsistent with information in the Commission's public records that was not before the jurisdictional agency when the determination was made. Section 503(b) sets forth specific time limits within which the Commission must act on a determination once the determination has been received. If the Commission fails to act within the time limits, the determination becomes "final."

In Section 107 of the NGPA, 15 U.S.C. § 3317, Congress authorized the Commission to establish, "by rule or order," a "special price" which is "necessary to provide reasonable incentives for the production of . . . high cost natural gas." 15 U.S.C. § 3317(b). Acting under this authority, the Commission issued regulations which established an incentive price for gas produced from "tight formations," sedimentary layers of rock cemented together in a manner that greatly hinders the flow of any gas through the rock. *Regulations Covering High-Cost Natural Gas Produced From Tight Formations*, 45 *Fed. Reg.* 56034 (August 22, 1980) *reh'g denied and clarified*, 45 *Fed. Reg.* 71563 (October 29, 1980), *aff'd, Pennzoil Company* v. *FERC*, 671 F.2d 119 (5th Cir. 1982).[2] The Commission determined that "tight formation gas" qualified for an incentive price because such formations are generally characterized by low permeability. As a result, "wells drilled into gas-bearing formations of this kind usually produce at very low rates. To stimulate production [of gas] from these formations, producers must use expensive enhanced recovery techniques." Order No. 99, *supra*, 45 *Fed. Reg.* at 56035. In Order No. 99, the Com-

[2] In an Initial Rule issued on February 12, 1990, the Commission terminated in part the tight formation ceiling price, but only for wells spudded or recompleted after May 12, 1990. *Limitation on Incentive Prices For High Cost Gas To Commodity Values*, FERC Docket No. RM82-32-002 (Order No. 519). The Commission's Order No. 519 would in no way affect the wells that are at issue in this case.

mission established procedures under which the "jurisdictional agencies" responsible for supervision of natural gas production activities in the respective states and on federal lands would "recommend" to the Commission that a formation receive the tight formation designation. The Commission also established guidelines for evaluating whether a given formation should be designated as a tight formation. 18 C.F.R. § 271.703(c).[3]

II. PROCEEDINGS BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

A. Designation Of The Travis Peak Formation

In November, 1981, the Railroad Commission of the State of Texas ("TRC") submitted a recommendation to the Commission that the Travis Peak Formation receive designation as a tight formation, in accordance with the procedures established in Order No. 99. Following several years of controversy between the Commission and the TRC over the proper methodology for evaluating the geological characteristics of the Travis Peak,[4] on May 23, 1986, the Commission designated the Travis Peak as a tight formation, with several minor modifications. *High-*

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[3] The guidelines contain standards for the expected permeability of the rock, the expected gas productivity in an unstimulated state, and the expected production of oil in association with gas from the formation. App. 103a.

[4] The TRC based its conclusion that the Travis Peak Formation qualified as a tight formation on a methodology known as "geometric mean averaging." The geometric mean averaging approach is based upon the recognition that permeability in a geological formation follows of lognormal distribution, which is a skewed geometric distribution. The geometric mean average is calculated by taking the logarithm of each permeability value and dividing by the total number of values. By contrast, the Commission employed an arithmetic averaging methodology, under which it simply adds the permeability and flow rate figures for each well, and divides by the number of wells. *See* Order No. 450, 52 *Fed. Reg.* at 2402 n. 6; App. 20a n. 6.

Cost Gas Produced From Tight Formations, 51 *Fed. Reg.* 19164 (May 28, 1986), III FERC Stats. and Regs. [Regs. Preambles] (CCH) ¶ 30,698 (1986) ("Order No. 450") (App. 17a-27a).

B. Individual Well Category Determinations

Order No. 450 became effective thirty days following publication in the *Federal Register*. After the effective date (June 23, 1986), eleven operators of wells drilled into the Travis Peak, including EPO, applied to the TRC for individual tight formation well determinations under Section 503 of the NGPA and the Commission's Regulations.[5] The TRC subsequently issued orders which determined those wells to qualify as tight formation wells, and forwarded the determinations to the Commission. Under NGPA Section 503(b), the Commission has the authority to reverse or remand well determinations, if it makes an appropriate preliminary finding and notice thereof to the jurisdictional agency within forty-five days of the date the Commission received the notice. 15 U.S.C. § 5413(b). In this case, the Commission took no action with regard to the seventy-three wells within the forty-five day period; hence, the wells' status as tight formation wells became "final" under the statute.

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[5] 18 C.F.R. §§ 274.101-274.501; 18 C.F.R. §§ 275.101-275.206. In addition to qualifying the tight formation as a whole, producers of gas from that formation must also qualify each well drilled into and completed in that formation as either a "new" or "recompletion" "tight formation well." In addition to a showing that the well is completed in a tight formation, the well operator must show (1) either the surface drilling or recompletion of the well was begun on or after July 16, 1979, the date on which President Carter encouraged establishment of the tight formation incentive program, in an address to Congress; and (2) the gas also qualifies under NGPA Sections 102 (new natural gas) or 103 (gas produced from a new, onshore production well).

C. Consideration Of The Travis Peak Formation Under The Section 503 Procedures

On January 9, 1987, over seven months after issuance of Order No. 450, the Commission vacated that order, based in part upon a rehearing request filed by an intrastate pipeline company that purchased gas in the Travis Peak Formation. *High-Cost Gas Produced From Tight Formations*, 52 *Fed. Reg.* 2401 (January 22, 1987) (App. 28a-41a). The Commission reopened the record to permit supplementation with additional data, and set the proceeding for formal hearing. In the order, the Commission acknowledged its awareness that "a number of Travis Peak well determinations have become final under 18 C.F.R. § 275.202(a) (1986)." 52 *Fed. Reg.* at 2403 n.15; App. 35a, n.15. The Commission indicated that those final determinations would be "addressed" in a separate order. 52 *Fed. Reg.* at 2403 n.15; App. 35a, n.15.

The formal hearing ordered by the Commission never took place. While the proceeding was still in the prehearing stage, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *Williston Basin Interstate Pipeline Company* v. *FERC*, 816 F.2d 777 (1987). There, that Court held that judicial review of tight formation designations was controlled by Section 503 of the NGPA, the well category determination provision, rather than the Commission's general rulemaking authority under Section 501 of the NGPA, which the Commission had relied on in Order No. 99 as its authority for designating tight formations. Although that Court did not determine whether the procedure that the Commission substituted for the Section 503 procedure "was in any way defective," 816 F.2d at 783, the Commission amended the regulations by which it designated tight formations. The Commission determined on its own to utilize prospectively the Section 503 procedure to designate tight formations. *Procedures For De-*

termining High-Cost Natural Gas Produced From Tight Formations, 52 *Fed. Reg.* 29003 (August 5, 1987) III F.E.R.C. Stats. and Regs. [Regs. Preambles] (CCH) ¶ 30,759 (1987) ("Order No. 479").

Adopting the new designation procedures in lieu of the previous rulemaking procedures, the Commission issued a notice of preliminary finding that the Travis Peak designation should be remanded to the TRC, on the same day that Order No. 479 was issued. *Texas Railroad Commission, Travis Peak Formation*, 40 F.E.R.C. ¶ 61,100 (1987) (App. 42a-50a). The Commission based its preliminary determination on a finding that the TRC's determination was not consistent with the information in the Commission's public files. Following a "comment period" in which the Commission heard from several Travis Peak producers (including EPO) and others, the Commission issued a final finding remanding the Travis Peak determination to the TRC. *Texas Railroad Commission, Travis Peak Formation*, 41 F.E.R.C. (CCH) ¶ 61,213 (1987) ("Remand Order"). App. 59a-79a.

D. Reopening The Seventy-Three Final Tight Formation Wells

On the same day the Commission ordered the Travis Peak determination remanded to the TRC, the Commission issued an order reopening the seventy-three final tight formation well determinations, purporting to act under Section 503(d). *Texas Railroad Commission, Travis Peak Formation*, 41 F.E.R.C. (CCH) ¶ 61,242 (1987). ("Reopening Order"). App. 51a-58a. The Commission acknowledged that under Section 503(d), a final well determination is binding upon the Commission unless, in making the determination, (1) the Commission or the jurisdictional agency (in this case, the TRC) "relied on any untrue statement of material fact" or (2) "there was omitted a statement of material fact neces-

sary to make the statements not misleading, in light of the circumstances under which they were made." *Id.*, at 61,635. The Commission found that the well determinations had been based upon an "untrue fact," because (1) the Commission had vacated its order designating the Travis Peak Formation as a tight formation, and (2) the Commission had remanded the Travis Peak Formation to the TRC for further proceedings. App. 57a.

In subsequent orders, the Commission dismissed EPO's requests for rehearing of both the Remand Order and Reopening Order. *Texas Railroad Commission, Travis Peak Formation,* 42 F.E.R.C. (CCH) ¶ 61,074 (1988) (App. 87a-92a) and 42 F.E.R.C. (CCH) ¶ 61,075 (1988) (App. 80a-86a). The Commission held that rehearing of the Remand Order did not lie, because Section 503(b)(4) of the NGPA provided for direct judicial review (App. 90a); further the Commission held that rehearing of the Reopening Order did not lie because the order was "procedural in nature" (App. 83a). With respect to the Reopening Order, the Commission did not indicate any other statutory basis upon which rehearing was denied.

III. PROCEEDINGS BEFORE THE COURT OF APPEALS

EPO filed petitions for review of both the Reopening Order and the Remand Order with the Fifth Circuit, which that Court reviewed pursuant to its authority under Section 506(a)(4) of the NGPA. In its brief, the Commission contended, for the first time,[6] that the statutory scheme of the NGPA precludes judicial review of all Commission orders under Section 503 other than reversal and remand orders under Section 503(b), *citing Williston Basin Interstate Pipeline Company* v. *FERC, supra,* and *Mesa Petroleum Company* v. *FERC,* 688 F.2d

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[6] Although the Commission previously dismissed EPO's request for rehearing of the Reopening Order, the Commission did not suggest that rehearing was precluded by the statutory scheme of the NGPA.

1014 (5th Cir. 1982). The Fifth Circuit dismissed EPO's petition for review of the Reopening Order for lack of jurisdiction, and affirmed the Remand Order.[7] In its opinion, the Fifth Circuit held that under Section 503(c)(4) of the NGPA, 15 U.S.C. § 3413(c)(4), "the Commission's NGPA related determinations, including determinations such as the one presented by the instant case, 'shall not be subject to judicial review under any Federal or State law except as provided under subsection (b)' of this section." 887 F.2d at 87; App. 12a. The Fifth Circuit stated that because subsection 503(b) limits judicial review to cases in which the Commission reverses or remands a jurisdictional agency determination, a court could not review a Commission order under Section 503(d) reopening a final determination. The court, however, remarked that the Commission had exceeded its Section 503(d) authority by reopening the final determinations based on its finding that *Commission's own designation* of the Travis Peak Formation was an "untrue statement of fact:"

> We are persuaded that Congress did not intend for the Commission to exercise its § 503(d)(1)(A) "untrue statement of a material fact" reopening authority in such a manner. If such were the case, every local regulatory authority decision with which the Commission disagreed would be automatically reviewable.

887 F.2d at 87 n.10. App. 13a n.10. EPO sought rehearing of the portion of the Fifth Circuit's opinion that dismissed EPO's petition for review of the Reopening Order. The Fifth Circuit denied rehearing on November 30, 1989.

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[7] The Travis Peak Formation proceeding is currently pending before the TRC. The TRC had stayed the remand pending the Fifth Circuit's action on EPO's petition for review. Although EPO continues to believe that the Fifth Circuit erred in remanding the Travis Peak proceeding to the TRC, EPO seeks review by this Court only with regard to the Reopening Order.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW IS IN CONFLICT WITH HOLDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This case presents an important issue of first impression in the administration of the NGPA. The opinions of two circuits are in conflict with regard to this issue. The Fifth Circuit's holding that it lacks jurisdiction to review orders in which the Commission purports to exercise its authority under Section 503(d) conflicts directly with the opinion in *ANR Pipeline Company* v. *FERC*, 870 F.2d 717 (D.C. Cir. 1989). In *ANR*, the District of Columbia Circuit reviewed and affirmed Commission orders under Section 503(d) in which the Commission refused to disturb a final well determination. Unless this conflict between the District of Columbia and Fifth Circuits is resolved, it appears that the District of Columbia Circuit will review, pursuant to the general judicial review provision of the NGPA, Section 506(a)(4), orders issued under Section 503(d), but the Fifth Circuit will not review such orders.

This Court should resolve this conflict between the District of Columbia and Fifth Circuits by holding that Section 506(a)(4) of the NGPA provides for judicial review of Commission orders issued under Section 503(d). Without such review, the Commission may continue to misapply the standards of Section 503(d), without any possibility for corrective action on judicial review in the Fifth Circuit. In declining review, the Fifth Circuit stated that the Commission had *misapplied* Section 503(d). The Fifth Circuit's own statements thus underscore the importance of judicial review of Commission action under Section 503(d), and the importance of consistent interpretation by the different circuits.

ANR involved two final well category determinations. Conoco Inc. had applied to the United States Geological

Survey (now the Minerals Management Service) for determinations that two wells qualified under Section 102 (d) ("new natural gas") on the basis of data submitted which showed that the gas produced by each well came from a reservoir discovered on or after July 27, 1976. Under Section 503(b) and the Commission's Regulations, the two determinations became final on June 28, 1979, forty-five days after notification. *ANR Pipeline Company* v. *Conoco Inc.*, 40 F.E.R.C. (CCH) ¶ 61,278, *reh'g denied*, 43 F.E.R.C. (CCH) ¶ 61,061 (1988), *aff'd sub nom. ANR Pipeline Company* v. *FERC* 870 F.2d 717 (D.C. Cir. 1989).

Based on *subsequently*-developed information, Conoco became persuaded that the gas produced from the two wells in question actually originated in a reservoir discovered before July 27, 1976, and thus did not qualify for incentive pricing under Section 102(d). Conoco filed a petition to reopen and vacate the determinations. However, Conoco withdrew the petition, after the Commission issued a declaratory order in *Mobil Oil Exploration & Producing Southeast Inc., et al.*, 34 F.E.R.C. (CCH) ¶ 61,211 (1986), in which it held that Section 503(d) did not require the reopening of a final well category determination that was contradicted by *later*-acquired information.

Following withdrawal of Conoco's petition, ANR filed a complaint with the Commission seeking the same result, that is, the reopening and vacation of the two well category determinations. The Commission dismissed ANR's complaint, finding that Conoco had submitted "all relevant information to MMS at the time the applications were processed" and that the information available to the agency was "correct and complete." *ANR Pipeline Company* v. *Conoco Inc.*, 40 F.E.R.C. (CCH) ¶ 61,278 at p. 61,909.

In *ANR*, the District of Columbia Circuit affirmed the Commission's interpretation of Section 503(d) as "not

merely permissible but, indeed, the most natural interpretation of Section 503(d)," employing the standard of review articulated by this Court in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). 870 F.2d at 721. That Court stated that "[t]he Commission's focus on the facts *as they were known* at the time the determinations were made is consistent with Congress' use of the past tense throughout Section 503(d)." *Id.* at 721 (emphasis in original). Analyzing the statute further, that Court found that the reference in Section 503 (d) to 18 U.S.C. § 1001, which imposes criminal penalties upon anyone who "knowingly and willfully" provides a federal agency with false or misleading information, "strongly implies that the accuracy and completeness of the information submitted is to be judged on the basis of *contemporary* knowledge." *Id.* at 721 (emphasis in original). Finally, that Court found that the Commission's construction of Section 503(d) in *ANR* and *MOEPSI* "promotes one of the [NGPA's] principal goals," which is "giving producers confidence in the finality of the Commission's well determinations." *Id.* at 721.[8]

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[8] The opinion in *ANR* is especially significant because the District of Columbia Circuit has specifically considered the question of its jurisdiction to review Commission action under Section 503. In *Williston*, that Court held that it lacked jurisdiction to review orders *affirming* the *designation* of a tight formation. That Court raised the jurisdictional issue on its own motion. *All* of the parties, including the Commission and the petitioner, contended that judicial review *was* authorized, because the Commission designated the tight formation pursuant to its general rulemaking authority under Section 501, and rulemaking orders are subject to judicial review. That Court rejected the position advocated by the parties, and held that judicial review of the designation was governed by Section 503. That Court held that Section 503 precluded judicial review in *Williston*, because the Commission *affirmed* the determination of the jurisdictional agency under Section 503(b). By contrast, in *ANR*, that Court correctly exercised its authority to review Section 503(d) orders under the generally-applicable review provision of the NGPA, Section 506(a)(4).

The conflict between the District of Columbia and Fifth Circuits relates to a matter of importance in the administration of the NGPA. Under Section 503 of the NGPA, over 400,000 wells have received well category determinations that established either price category or deregulated status for the gas produced from those wells. As the District of Columbia Circuit recognized in *ANR*, the administration of Section 503(d) "promotes one of the Act's principal goals. By giving producers confidence in the finality of the Commission's well determinations, the section (as interpreted) encourages the development of new energy supplies." *ANR*, 870 F.2d at 721 (citations omitted). By contrast, the Fifth Circuit's refusal to review Commission action under Section 503(d), even when the court acknowledged that the Commission has misinterpreted the provision, undermines the program.[9]

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[9] The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 102 Stat. 157 (1989) ("1989 Act"), deregulates certain categories of first sales prior to January 1, 1993, and provides for the complete decontrol of wellhead prices for first sales of natural gas as of January 1, 1993, by repealing Title I of the NGPA. The 1989 Act would repeal NGPA Section 503, effective January 1, 1993. Section 3(b)(6). However, the Section 503(d) authority of the Commission will be a matter of continuing concern until the January 1, 1993 decontrol date, and may present continuing uncertainty beyond that date. First, the 400,000 "final" wells *may* be subject to reopening and vacation beyond January 1, 1993. Moreover, in its Notice of Proposed Rulemaking to implement the 1989 Act, the Commission requested comments on the "desirability of continuing to allow producers to file applications for well determinations after the subject gas had otherwise been decontrolled. . . . in view of the fact that Section 29 of the Internal Revenue Code provides for a tax credit for the production of fuel from nonconventional sources. . . ." Proposal Implementing the Natural Gas Wellhead Decontrol Act of 1989, 54 *Fed. Reg.* 51902 (December 18, 1989). This rulemaking proceeding is presently in the comment stage before the Commission.

II. THE FIFTH CIRCUIT'S OPINION APPLIES PRINCIPLES OF STATUTORY INTERPRETATION TO THE NGPA IN A MANNER THAT DEPARTS FROM APPLICABLE DECISIONS OF THIS COURT.

A. Section 506 Is A Broad Grant Of Appellate Jurisdiction—Exceptions Must Be Narrowly Construed.

The Fifth Circuit's opinion "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup.Ct.R. 10.1(a). Section 506 of the NGPA, 15 U.S.C. § 3416, which generally governs judicial review of Commission orders issued under the NGPA, applies "to judicial review of *any* order, within the meaning of Section 551(6) of Title 5 (other than an order assessing a civil penalty under Section 3362 of this title or any order under Section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing." 15 U.S.C. § 3416(a)(1); App. 99a (emphasis added). "The plain meaning of the statute decides the issue presented." *Bethesda Hospital Association* v. *Bowen*, 485 U.S. 399, 403 (1988), *quoted in FERC* v. *Martin Exploration Management Company*, 486 U.S. 204, 209, (1988). "In determining the scope of a statute, we look first to its language." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), *quoted in United States* v. *Monsanto*, 57 U.S.L.W. 4826, 4827 (U.S. June 22, 1989). Thus, in the absence of an express exclusion, Section 506 applies to review of Commission orders issued under the NGPA, including orders issued under Section 503(d). Exceptions must be narrowly construed. *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). Section 506 contains no exception to the general review provision applicable to orders reopening or vacating final determinations under Section 503(d). Therefore, by its express terms, the NGPA provides the courts of appeals with jurisdiction to review Commission orders issued under Section 503(d), such as the Reopening Order.

B. The Section 503(c)(4) "Exception" To Section 506 Jurisdiction Does Not Apply To Section 503(d) Orders.

While the *express language* of Section 506(a)(1) requires this Court to find that the courts of appeals have jurisdiction to review the Reopening Orders, the same conclusion is also supported by the language and design of the NGPA as a whole. *Bethesda Hospital Association* v. *Bowen*, 485 U.S. at 405. The Fifth Circuit held that Section 503(c)(4) limits judicial review to final determinations to reverse or remand under Section 503(b), and precludes judicial review of orders issued under Section 503(d) to reopen and vacate final determinations. 887 F.2d at 87 (App. 13a). However, the Fifth Circuit's reading "seriously misapprehends the nature of the provisions in question." *Monsanto*, 57 U.S.L.W. at 4829. The NGPA certainly does not *require* such a result; indeed, the NGPA does not even *support* such a result.

1. The Section 503(b) Determination Procedure Applies To Category Determinations. Section 503(b) of the NGPA (App. 95a-96a) sets forth the process by which the jurisdictional agency and the Commission determine the particular NGPA category for which particular gas qualifies. In general, three outcomes are possible. The Commission can *affirm* a jurisdictional agency determination by not acting on that determination within the prescribed time periods. This method of affirmance applies both to jurisdictional agency determinations that gas (1) does or (2) does not qualify for the particular category sought.

Second, the Commission can *remand* a determination, based on a finding that the determination "is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which" the determination was made. 15 U.S.C. § 3413(b)(2)(A). Third, the Commission can *reverse* a determination, if it finds that the determination "is not supported by substantial evidence in the record upon

which" the jurisdictional agency made the determination. 15 U.S.C. § 3413(b)(1)(A). The Commission's authority to reverse or remand a determination is governed by strict time limits. Under either option, the Commission must make an appropriate preliminary finding within forty-five days after the date on which the Commission received notice of the determination; in addition, the Commission must make a final finding within one hundred and twenty days of the preliminary finding. 15 U.S.C. §§ 3413(b)(1)(B) and 3413(b)(2)(B).

Judicial review of *remand* and *reversal* orders is specifically controlled by subsection 503(b)(4), 15 U.S.C. § 3413(b)(4). That section provides that orders remanding and reversing jurisdictional agency determinations are subject to judicial review "in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit." The NGPA does not expressly provide for judicial review of Commission *affirmance* of jurisdictional agency determination.[10]

2. The Section 503(d) Reopening and Vacating Procedure Is Altogether Different Than The Section 503(b) Determination Procedure. Section 503(d) (App. 98a-99a) provides that final determinations, which have passed the Commission review stage, may be reopened and vacated only if (1) the Commission or the jurisdictional agency relied on an "untrue statement of a material fact," or (2) there was omitted "a statement of material fact necessary . . . to make the statements made not misleading. . . ." 15 U.S.C. § 3413(d). Section 503(d) provides further that "[a]ny untrue statement or omission of material fact to a Federal or state agency upon which the Com-

[10] The NGPA does not require the Commission to issue an order affirming a jurisdictional agency determination; if the Commission does not act within the prescribed time periods, the determination becomes final.

mission relied shall be deemed a statement or entry under Section 1001 of Title 18." [11]

3. Section 503(c)(4) Applies Only To Determinations Under 503(b), Not To Orders Reopening And Vacating Final Determinations Under Section 503(d). The Fifth Circuit has held that judicial review of Commission final determinations is limited by subsection 503(c)(4). *Mesa Petroleum Corporation* v. *FERC*, 688 F.2d 1014, 1016 (1982). That subsection, which appears under Section 503(c), "state authority," provides as follows: "(4) Judicial review.—Any such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section." App. 98a. In turn, subsection (a)(1) sets forth the categories of gas to which the determination procedure applies (App. 94a); paragraph (c)(3) (provides that the jurisdictional agency shall make its determinations in accordance with its own producers. In *Mesa*, the Fifth Circuit held that Section 503(c)(4) precluded this Court from review of Commission affirmance of jurisdictional agency determinations. EPO does not challenge this holding.

However, viewed in the context of the organization of Section 503, subsection 503(c)(4) is clearly *inapplicable* to judicial review of Commission orders reopening and vacating final determinations under Section 503(d). The need for review by this Court is especially great, because the Fifth Circuit's interpretation of Section 503(c)(4) as prohibiting judicial review of Section 503(d) reopening orders is not only inconsistent with the wording of Section 503(c)(4), but undermines the NGPA's goal of promoting certainty in the determination process. *Pat-*

[11] As noted by the District of Columbia Circuit in *ANR*, this section imposes criminal penalties on anyone who knowingly and willfully provides a federal agency with false or misleading information.

terson v. *McClean Credit Union*, 57 U.S.L.W. 4705, (June 15, 1989) (affirming dismissal of private action under 42 U.S.C. § 1981 for employment discrimination based upon racial harassment). Section 503(c)(4) is merely intended to ensure that (1) only the Commission, not a Federal or state court, shall review jurisdictional agency determinations and (2) judicial review of Commission final determinations under Section 503(d) is limited to the circumstances set forth in Section 503(b)(4). The NGPA thus avoids multiple reviewing authorities imposing inconsistent standards. By contrast, Section 503(d) does not involve the determination that natural gas qualifies for a particular NGPA category, does not involve the jurisdictional agencies, contains no time limits for Commission action, and provides no formal procedures. Congress structured Section 503 to make Section 503(b) and Section 503(d) separate, independent provisions within the overall section. Congress would not have established separate sections for (1) making well category determinations and (2) reopening and vacating final determinations if it had intended for the two sections to be construed as indistinguishable.

In summary, subsection 503(c)(4) does not support, let alone compel, the Fifth Circuit's holding that it lacked jurisdiction to review the Commission's Reopening Order.

C. The Pertinent Legislative History Of The NGPA Supports An Assertion Of Jurisdiction.

The legislative history of Section 506(a)(4) and 503 of the NGPA indicates that the general judicial review provision (Section 506(a)(4)) is controlled by the specific review provision for determinations contained in Section 503(b). However, in the Reopening Order, the Commission did not act under Section 503(b). The Commission reopened the final Travis Peak well category determinations under Section 503(d), a distinct subsection with entirely different procedures and substantive standards.

The legislative history does not support the Fifth Circuit's holding that Congress intended to foreclose review of Commission orders reopening and vacating final determinations under Section 503(d).

The floor debates and the conference report concerning the NGPA do not expressly state that Commission reopening and vacating orders under Section 503(d) are subject to judicial review under Section 506. However, the legislative history under Section 506 *plainly and unmistakably* compels a finding that Section 506 was intended *only* to preclude judicial review of Commission Section 503(b) action *affirming* jurisdictional agency determinations. Section 506 was *not* intended to prevent judicial review of Section 503(d) orders. The Congress did not place, and did not intend to place, any such jurisdictional limitation on Commission orders under Section 503(d) reopening and vacating final determinations.

In his floor statement on the NGPA, Representative Dingell stated that the Section 506 does not apply to Section 503(b) determinations.

> Section 506(a)(1) does not now fully reflect the separate judicial review procedures established under Section 503. Section 506(a)(1) should have included a paranthetical [sic] exclusion (other than a final finding by the Commission under Section 503(b)(1), an order assessing a civil penalty under Section 504(b)(6), or an order under Section 302 or 308). . . . In particular, the judicial review requirements of Section 503(b) are intended to be distinct from the judicial review provisions set forth in Section 506.

124 Cong. Rec. H. 13119 (daily ed. October 14, 1978). Significantly, Congressman Dingell's remarks did *not* refer to Section 503(d) orders reopening and vacating final determinations. His statement cannot be understood to preclude judicial review of such orders.

In summary, the legislative history of the NGPA requires the conclusion that Section 506 grants the United States Courts of Appeals jurisdiction to review orders under Section 503(d) reopening and vacating final determinations.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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